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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 114.

JUAN POSADAS, JR., Collector of Internal Revenue of the Philippine Islands,

Petitioner,

—against—

THE NATIONAL CITY BANK OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

HARRY W. FORBES,
Attorney for Respondent.

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FRANK A. F. SEVERANCE,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM—1935.

NO. 114.

JUAN POSADAS, JR., Collector of Internal Revenue of the Philippine Islands,

Petitioner,

—against—

THE NATIONAL CITY BANK OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the Court of First Instance (Record, pp. 132-37) and the opinions of the Philippine Supreme Court (Record, pp. 142-61) have not been officially reported.

Statement.

The National City Bank of New York (hereinafter referred to as the "Bank") is a national banking association with its principal office and place of business in New York City. It operates branches in Manila and Cebu in the Philippine Islands, under authority conferred by the Federal Reserve Board, pursuant to Section 25 of the Federal Reserve Act.

The Government of the Philippine Islands imposed, and the Bank paid, a tax on the net income

of the business of the Bank in the Philippine Islands for the first half of the year 1931 (Record, pp. 109, 110). There is no controversy with respect to the income tax.

The Government of the Philippine Islands, however, in addition to the income tax, imposed, and the Bank paid, under protest, a tax for the first half of the year 1931 amounting to 77,324 pesos and 11 centavos (Ps. 77,324.11) as deposit and capital taxes for the first half of the year 1931.

The Bank brought this action in the Court of First Instance of Manila, Philippine Islands, against Juan Posadas, Jr., Collector of Internal Revenue of the Philippine Islands, to recover the said Ps. 77,324.11 paid under protest.

The Court of First Instance of Manila allowed a recovery of the tax on the deposits but not of the tax on the capital (Opinion, Record, pp. 132-137).

The Supreme Court of the Philippine Islands, in a careful opinion, printed as an Appendix to this brief (*post,* pp. 34-47), one Judge dissenting, ordered a refund of the taxes both on the deposits and on the capital.

The Collector's petition for a writ of certiorari to this Court was allowed on October 14, 1935.

Question Presented.

The question presented in this case is whether a national bank, *in addition* to being subject to the payment of taxes on its real estate in the Philippine Islands and a tax on its net income from the business conducted by its branches in the Philippine Islands, may also be subjected to taxes upon its *capital* employed in the Philippine Islands and upon *deposits* in its Philippine branches. Concededly no

such taxes could be imposed on a national bank in any state or territory. The question presented is not, as stated by the petitioner, whether the Philippine Government may impose *any* tax upon the Philippine branches of a national bank; and the question whether the National Bank Act or the Federal Reserve Act extend to the Philippine Islands is immaterial.

Furthermore, the question whether there is any *implied prohibition* against the taxation of branches of a national bank by the Philippine Government is not involved. *The only question is whether Congress has granted to the Philippine Government power to impose taxes on capital and deposits.*

This precise question has recently been decided by this Court in *Domenech* v. *National City Bank* (294 U. S. 199), where it was held that Puerto Rico could not impose taxes on this respondent, in addition to real estate and income taxes, in the absence of an express grant of such power by Congress. Petitioner does not claim that Congress has expressly granted any such power to the Philippine Government.

Facts.

On April 30, 1932, the respondent filed with the Bureau of Internal Revenue of the Philippine Islands a Return of its net income from its Philippine branches for the year 1931, showing a total of Ps. 518,871.61, upon which on June 3, 1932, it paid an income tax of Ps. 15,566.15, in accordance with the Internal Revenue Laws of the Philippine Islands. This tax was paid without protest and is not in controversy.

In addition to this tax, however, the Philippine Government attempted (Record, Ex. F, p. 83) to levy a tax on the portion of the average capital of

the respondent employed in the Philippine Islands of Ps. 16,104.68, and a tax on the average monthly deposits of the respondent's Philippine branches of Ps. 61,219.43, aggregating Ps. 77,324.11. The amount of capital employed in the Philippines was determined arbitrarily (Record, pp. 22-3), since the respondent's branches have no capital of their own. These taxes were paid under protest (Ex. J, Record, p. 112), the respondent contending that, since it is a national banking association subject to taxation only as permitted by R. S., Section 5219, the Philippine Government, having imposed a tax on net income, is without power to impose any capital or deposit taxes.

Contention of the Bank.

The Bank claims that the capital and deposit taxes are illegal and void and were imposed without power or authority of law, because Congress has never granted to the Philippine Government power to impose such taxes on a national bank, which is a Government instrumentality.

Statutes Involved.

For the convenience of the Court the pertinent provisions of the following statutes are printed in an appendix to this brief (Exhibits A, B and C, pp. 21-33).

The National Bank Act:

Section 5153 of the Revised Statutes as amended by Act of March 3, 1901, c. 871, Sec. 1, 31 Stat. 1448; Act of March 4, 1907, c. 2913, Sec. 3, 34 Stat. 1290; Act of December 23, 1913, c. 6, Sec. 27, 38 Stat. 274; Act of August 4, 1914, c. 225, 38 Stat. 682 and by Act of June 25, 1930, c. 604, 46 Stat. 809 (12 U. S. C. A. 90).

Section 5211 of the Revised Statutes as amended by Act of February 27, 1877, c. 69, Sec. 1. 19 Stat. 252; Act of December 28, 1922, c. 18, 42 Stat. 1067 and by Act of February 25, 1927, c. 191, Sec. 13, 44 Stat. 1232 (12 U. S. C. A. 161).

Section 5219 of the Revised Statutes as amended by Act of March 4, 1923, c. 267, 42 Stat. 1499, and by Act of March 25, 1926, c. 88, 44 Stat. 223 (12 U. S. C. A. 548).

Section 5329 of the Revised Statutes (12 U. S. C. A. 93).

Section 5240 of the Revised Statutes as amended by Act of February 19, 1875, c. 89, 18 Stat. 329 and by Act of December 23, 1913, c. 6, Section 21, 38 Stat. 271 (12 U. S. C. A. 481).

The Federal Reserve Act:

Section 25, Act of December 23, 1913, c. 6, 38 Stat. 251, 273.

Section 25, Act of December 23, 1913, as amended by Act of September 7, 1916, c. 461, Section 25, 39 Stat. 752, 755.

Philippine Administrative Code together with the enacting clause of the code (Philippine Act, No. 2711, approved March 10, 1917):

Section 1499.

Section 1502.

POINTS.

FIRST.

The National City Bank of New York is an instrumentality of the United States Government.

The creation of national banks was authorized in 1863 (12 Stat. L. 665) "for carrying into effect national powers granted by the Constitution."

> *Owensboro Nat. Bank* v. *Owensboro,* 173 U. S. 664, 667.

The National Bank Act (R. S. Sec. 5153, 12 U. S. C. A., Sec. 90) makes them depositaries of public money and requires them to act as financial agents of the Government if required:

> "All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them."

Section 25 of the Federal Reserve Act authorizes national banking associations "to establish branches in foreign countries or dependencies or insular possessions of the United States for the furtherance of the foreign commerce of the United States and *to act, if required to do so, as fiscal agents of the United States*".

They are "instrumentalities of the Federal Government created for a public purpose and as such necessarily subject to the paramount authority of the United States."

Owensboro Nat. Bank v. *Owensboro,* 173 U. S. 664; 667-8;
Des Moines Nat. Bank v. *Fairweather,* 263 U. S. 103, 106;
Iowa-Des Moines Nat. Bank v. *Bennett,* 284 U. S. 239, 244.

They "are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies."

First Nat. Bank v. *Anderson,* 269 U. S. 341, 347.

The respondent was incorporated under the National Bank Act on July 5, 1865 (Record, p. 36) and has ever since been a fiscal agent of the United States Government; and, since this action was begun, its Manila Branch has acted as fiscal agent for the United States under the Gold Reserve Act of January 30, 1934 (Record, p. 148).

SECOND.

The respondent, being a Government instrumentality, is not subject to taxation by states or dependencies, unless the power is expressly granted by Congress.

The petitioner (Brief, p. 35) states:

"The presumption that a derivative sovereignty is not intended to tax instrumentalities of a superior sovereign, is after all only a rebuttable presumption; and, like other rebutta-

> ble presumptions, is to be used only as an aid in arriving at the true facts, here as an aid in arriving at the real intent of Congress."

It is submitted that this is not a correct statement of the rule. The inability of a state, territory or dependency to tax the instrumentalities of the sovereign is not based upon *presumption,* but is due to a complete lack of capacity to tax such instrumentalities. The power to tax is a power to retard, impede, burden or destroy; and, since *M'Culloch* v. *State of Maryland* (4 Wheat. 316), it has been the law of this country that states or dependencies cannot tax National Banks, since they are instrumentalities of the United States Government. The reason for the rule was stated by Marshall, *C. J.,* in that case as follows (4 Wheat. 426):

> "This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1. That a power to create implies a power to preserve. 2. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve. 3. That where this repugnancy exists, that authority which is supreme must control, not yield, to that over which it is supreme. * * * (p. 436) the States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control, the operations of the constitutional laws enacted by con-

> gress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared."

While that principle was originally declared only with reference to the States, it was later extended to the territories.

> *Talbott* v. *Silver Bow Co.*, 139 U. S. 438, 441.

And this Court has recently decided that the insular possessions and dependencies of the United States have no power to tax National Banks, unless that power has been expressly conferred by Congress.

> *Domenech* v. *National City Bank*, 294 U. S. 199, 204-5.

In that case it was held that Puerto Rico could not tax a branch of the respondent located within its territory, except as expressly permitted by Act of Congress. This Court held (pp. 204-5):

> "Puerto Rico, an island possession, like a territory, is an agency of the federal government, having no independent sovereignty comparable to that of a state in virtue of which taxes may be levied. Authority to tax must be derived from the United States. But like a state, though for a different reason, such an agency may not tax a federal instrumentality. A state, though a sovereign, is precluded from so doing because the Constitution requires that there be no interference by a state with the powers granted to the federal government. *A territory or a possession may not do so because*

> *the dependency may not tax its sovereign.* True the Congress may consent to such taxation; but *the grant to the Island of a general power to tax should not be construed as a consent. Nothing less than an act of Congress clearly and explicitly conferring the privilege will suffice.*" (Italics ours.)

The power to tax instrumentalities of the United States Government cannot, therefore, be implied from any general power to levy taxes which has been conferred upon the Philippine Government by Act of Congress:

> "The grant to the Island of a general power to tax should not be construed as a consent. Nothing less than an act of Congress clearly and explicitly conferring the privilege will suffice."

The petitioner does not claim that Congress has passed any act explicitly authorizing the capital and deposit taxes here in question, in addition to the income tax, which was paid without objection.

If dependencies may tax branches of National Banks located within their borders, it follows that they have power to tax forts, warships, lighthouses and other property of the sovereign located within their borders and there maintained in the public interest. The Supreme Court of the Philippine Islands has correctly decided that no such power exists.

> *Standard Oil Co. of New York* v. *Posadas*, 55 Phil. Rep. 715.

In that case it was held that the Philippine Government could not impose a tax on sales of oil made in the Philippines to the United States Army and Navy.

See also:

Wisconsin Cent. R. R. Co. v. *Price Co.*, 133 U. S. 496, 504;
Asiatic Petroleum Co. v. *U. S.*, 65 Ct. of Cl. 100, 112.

The same claim, made on behalf of the Philippine Government as long ago as 1912, was overruled by the Attorney General (29 Opinions of Attorneys General, 442) who held that the grant of a general power to tax did not give power to tax goods imported into the Islands for the use of the United States Government. He further held that the fact that Congress had not annulled the Philippine Tax Act was unimportant, as power to annul was reserved only for Acts whose policy Congress does not approve; and that *ultra vires* Acts need not be annulled, as they are void, not being an exercise of delegated powers.

These rulings dispose of petitioner's contention (Brief, p. 40) that exemption of instrumentalities of the United States Government from taxation violates the requirement of the Jones Act, Section 3, "that the rule of taxation in said islands shall be uniform". This provision was not a surrender of the Sovereign's immunity from taxation. It was not intended to prescribe *what property* was subject to tax, but merely required that all property which *was* subject to taxation should be taxed uniformly.

THIRD.

The Philippine branches are offices of the respondent.

The petitioner states (Brief, p. 45):

> "Whatever else those so-called 'branches' of the National City Bank in the Philippine

> Islands may really be—if there is any legal authority whatever for their existence at all—they are not really branches of the National City Bank of New York under Section 25 of the Federal Reserve Act or any other act of the United States. They owe their existence in the Philippine Islands, and their continued tolerance there wholly to Philippine Law."

I. It is idle to contend that these branches are not, in fact, a part of the National City Bank of New York. They have no separate corporate franchise or capital.

They are operated under powers of attorney executed by the Head Office of the National City Bank of New York (Record, Ex. E, pp. 71-80) and pursuant to its By-laws (Record, Ex. C, pp. 53-54). All the activities of these branches are directed and controlled by the Head Office of the National City Bank of New York (Record, pp. 14-16). Their operations are regularly inspected by representatives of the respondent's Head Office in New York (Record, pp. 12-13). All that belongs to them is property of the respondent.

As required by the National Bank Act (R. S. Sec. 5211, 12 U. S. C. A., Sec. 161; R. S., Sec. 5240, 12 U. S. C. A., Sec. 481), they make periodical reports to the Comptroller of the Currency and are subjected to periodical examinations by national bank examiners under the direction of the Comptroller of the Currency (Record, pp. 13, 23). The respondent's Head Office in New York is liable for any failure of such branches to perform their obligations.

Sokoloff v. *National City Bank,* 239 N. Y. 158, 167;

Sokoloff v. *National City Bank,* 250 N. Y. 69, 82;

Silverman v. *National City Bank,* 133 N. Y. Misc. 201, 207.

The Philippine Government itself has officially recognized that they are branches of the respondent by collecting income taxes (Record, pp. 7, 25; Ex. H, pp. 109-10) and by requiring a report of respondent's entire capital stock (Record, p. 19; Ex. F, pp. 83-108, in particular p. 85).

In view of these facts, it cannot be disputed that the Manila and Cebu Branches of the National City Bank of New York are a part of the organization of the respondent and that the taxes sought by the petitioner to be imposed on them are imposed upon the respondent.

M'Culloch v. *State of Maryland,* 4 Wheat. 316, 424-5;
Domenech v. *National City Bank,* 294 U. S. 199, 204.

In the *Domenech* case this Court held:

> "Taxation of a bank's branch is taxation of the bank itself."

The petitioner has attempted to tax the respondent through its branches, contrary to the Constitution and laws of the United States.

II. The petitioner contends that the Federal Reserve Act did not authorize the opening of these branches, stating (Brief, pp. 45-6):

> "The (Federal Reserve) Board has no power,—and never has had any power,—to license a branch bank in the Philippine Islands. The only power of the Board to license a branch of a national bank to be established outside of the continental United States,—or for any

such branch to be organized or to exist or to carry on business under any law of the United States,—is Section 25 of the Federal Reserve Act as amended; which does not authorize such a branch in the Philippine Islands, because the Act does not expressly mention those Islands, and it has never been extended there."

This contention is wholly immaterial to the question whether the Philippine Government has power to tax a National Bank. The respondent is lawfully in the Philippines, doing business under a permit granted by the Federal Reserve Board, which expressly found that it was acting "under the laws of the United States of America."

If the respondent has exceeded in any way the powers granted to it by law, the remedy provided by the National Bank Act (R. S., Sec. 5239; 12 U. S. C. A. Sec. 93) is "a suit brought for that purpose by the Comptroller of the Currency in his own name" in a district or territorial court of the United States.

No power to question the charter powers of a national bank is vested by law in the petitioner or in any representative of the Philippine Government.

However, although the question is entirely irrelevant to the issues in this action, the respondent was authorized by law to open its Philippine branches; and the proper office of the Philippine Government has certified that the order was "duly filed" with it (Record, p. 39); also respondent's Articles of Incorporation (Record, pp. 29-30), its By-Laws (Record, p. 43) and its Power of Attorney to the manager of its Philippine branches (Record, p. 71).

They were opened by the Bank pursuant to express authority granted by order of the Federal Reserve Board (Record, pp. 42-3), which found that the application was "properly made under the laws of the United States of America and should be granted."

Section 25 of the Federal Reserve Act of December 23, 1913 (38 Stat., Ch. 6, p. 251, Sec. 25) expressly authorized national banking associations possessing a capital and surplus of one million dollars or more to file application with the Federal Reserve Board for authority to establish branches "in foreign countries *or dependencies* of the United States for the furtherance of the foreign commerce of the United States and to act, if required to do so, as fiscal agents of the United States"; and this statute was amended in 1917 so as to substitute for the words "in foreign countries or dependencies of the United States", the words "in foreign countries or dependencies or insular possessions of the United States" (Act of September 7, 1916, 39 Stat., 755, Ch. 461).

This provision was an extension of the charter powers of National Banks having a capital of over one million dollars. It was not an extension of the Federal Reserve Act or of the National Bank Act either to foreign countries or to dependencies of the United States. Indeed, Congress had no power to extend those acts to foreign countries, although branches of National Banks which availed themselves of the power to open such branches carried the National Bank Act with them, into foreign countries and dependencies of the United States, so far as their charter powers and privileges were concerned.

It could not have been contemplated that these branches should operate in the Philippine Islands otherwise than in accordance with the laws of the United States, under which the Bank was organized.

> "Every corporation carries its charter wherever it goes, for that is the law of its existence."

Relfe v. *Rundle,* 103 U. S. 222, 226;

Canada Southern R. Co. v. *Gebhard,* 109 U. S. 527, 537.

This Court has held (*Talbott* v. *Silver Bow County,* 139 U. S. 438, 443; *Domenech* v. *National City Bank,* 294 U. S. 199, 204) that Congress intended "to create a national banking system coextensive with the territorial limits of the United States"; and this Court held, in the *Talbott* case, that the consent to tax, given by Section 5219 of the National Bank Act, extended to the territories, although they were not expressly mentioned in the Act.

The Philippine Islands were ceded to the United States by the Treaty of Peace with Spain on April 11, 1899 (48 U. S. C. A., Sec. 1001). They were "dependencies" of the United States on December 23, 1913, when the Federal Reserve Act became law.

34 Opinions of Attorneys General 287, 291 (Opinion of Hon. Harlan F. Stone to the Secretary of War, April 30, 1924);
34 Opinions of Attorneys General 460, 465-6 (Opinion of Hon. John G. Sargent, April 17, 1925).

The Federal Reserve Act was amended on September 7, 1916 (39 Stat., 755), by adding after the word "dependencies" the words "or insular possessions". The Philippine Islands were at that time and in 1931, when these taxes were imposed, a dependency and an insular possession of the United States, and they are still a dependency and an insular possession of the United States and will continue to be so for several years, under the Act providing for their ultimate independence, recently adopted by Congress.

By the expression "foreign countries or dependencies or insular possessions of the United States" National Banks were authorized to open branches anywhere in the world outside of the continental United States.

The petitioner's contention would require that this general grant of power should be restricted by implication, so as to read "in foreign countries or dependencies or insular possessions of the United States except in the Philippine Islands". Such a limitation will not be read into a statute by the courts.

No reason is suggested why the Philippine Islands alone, of all the places subject to the jurisdiction of the United States, should be deprived of the services of National Banks.

The action of the Federal Reserve Board, the duly constituted agency of the Government for the purpose of determining whether permission should be granted to a National Bank to open branches in the Philippines, in granting permission to the respondent in 1930 to open its branches in the Philippine Islands "under the laws of the United States of America" and the action of the Comptroller of the Currency in requiring reports and making examinations of these Philippine branches are administrative interpretations of the Federal Reserve Act which are entitled to great respect.

U. S. v. *Moore,* 95 U. S. 760;
Robertson v. *Downing,* 127 U. S. 607;
U. S. v. *Alabama R. R. Co.,* 142 U. S. 615;
U. S. v. *Hermanos y Compania,* 209 U. S. 337.

The petitioner contends (Brief, p. 32) that the fact that the Federal Reserve Board granted no

applications to open branches in the Philippines prior to 1916 amounts to an administrative construction of the Federal Reserve Act as not permitting the opening of such branches. This contention has no force, however, because of the further fact, stated by petitioner (Brief, p. 32), that no such application was made to the Federal Reserve Board prior to 1916.

This whole contention that the Philippine branches are not authorized by law is a new one in this Court. It was not raised in the petitioner's answer (Record, p. 8) or considered in the opinion of the Court below and is wholly immaterial to any issue in this case.

III. The petitioner raises the question whether the Federal Reserve Act and the National Bank Act extend to the Philippine Islands under the provisions of the Foraker Act and of the Jones Act. This question has no bearing whatever on the question here presented, whether the Philippine Government has power to tax the respondent on the alleged capital and on the deposits of its Philippine branches, having imposed a tax on their income. It has no bearing whatever on the question whether, by Section 25 of the Federal Reserve Act, *the charter powers of national banks,* having the required amount of capital, were extended so as to authorize them to open branches in dependencies of the United States, including the Philippine Islands. The various rulings of Attorneys General, cited by petitioner, that certain sumptuary and regulatory Acts of Congress, such as the Volstead Act, the Narcotic Drugs Act and the National Industrial Recovery Act do not extend to the Philippines also have no bearing on those questions.

By Section 25 of the Federal Reserve Act Congress declared, in the most explicit terms, that national banks, having a certain amount of capital, should have power to open branches in foreign countries and in dependencies of the United States, including the Philippines. It was not essential to such charter power that the Federal Reserve Act or the National Bank Act should be extended to the dependencies, any more than that they should be extended to foreign countries, in which also national banks were authorized by that section to open branches. Those Acts could not be extended to foreign countries; and there was no need that they should be extended to the dependencies, in order to effectuate this extension of the charter powers of national banks.

The Philippine branches were lawfully opened under Section 25 of the Federal Reserve Act and with the permission of the Federal Reserve Board. They are lawfully in the Philippines; and no claim is made by the petitioner that the respondent has not duly complied with all requirements of Philippine law, relating to its right to do business in the Philippines. The question whether the Federal Reserve and National Bank Acts are now in force in the Philippines is an interesting one upon which much might be said; but we shall not discuss it here, since the only question here presented is, whether the Philippine Government has the power, having levied and collected an income tax, to tax the respondent upon the alleged capital and the deposits of its Philippine branches.

FOURTH.

This case is controlled by the *Domenech* case.

In *Domenech* v. *National City Bank* (294 U. S. 199), this Court has very recently held that "a dependency may not tax its sovereign"; that a dependency or insular possession of the United States has no power to tax the local branches of a national bank, unless such power has been expressly conferred by Congress; that the grant of a general power to tax is not a consent to the taxation of national banks, and that "nothing less than an Act of Congress clearly and explicitly conferring the privilege will suffice".

The petitioner does not claim that any such clear and explicit consent has been given by Congress to the Philippine Government to levy the taxes here in question. Therefore, under the general rule laid down by the Court in the *Domenech* case, that "the dependency may not tax its sovereign", these taxes are clearly unauthorized and illegal.

FIFTH.

The judgment of the Supreme Court of the Philippine Islands should be affirmed, with costs.

Washington, November 20, 1935.

HARRY W. FORBES,
Attorney for Respondent.

CARL A. MEAD,
FRANK A. F. SEVERANCE,
Of Counsel.

APPENDIX.*

EXHIBIT A.

THE NATIONAL BANK ACT.

Section 5153 of the Revised Statutes as amended by Act of March 3, 1901, c. 871, Sec. 1, 31 Stat. 1448; Act of March 4, 1907, c. 2913, Sec. 3, 34 Stat. 1290; Act of December 23, 1913, c. 6, Sec. 27, 38 Stat. 274; Act of August 4, 1914, c. 225, 38 Stat. 682 and Act of June 25, 1930, c. 604, 46 Stat. 809 (12 U. S. C, A. 90).

"*Section 90. Depositaries of public moneys and financial agents of Government.* All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided,* that the Secretary shall, on or before the first of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all

* This appendix contains the text of relevant portions of statutes in force in 1931 when the tax in controversy was levied.

of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided,* That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different states and sections.

Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

Section 5211 of the Revised Statutes as amended by Act of February 27, 1877, c. 69, Sec. 1, 19 Stat. 252; Act of December 28, 1922, c. 18, 42 Stat. 1067, and Act of February 25, 1927, c. 191, Sec. 13, 44 Stat. 1232 (12 U. S. C. A. 161):

"*Section 161. Reports to Comptroller of the Currency; publication.* Every association shall make to the Comptroller of the Currency not less than three reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or of the cashier, or of a vice president, or of an assistant cashier of the association designated by its board of directors to verify such reports in the absence of the president and cashier, taken before a notary public properly authorized and commissioned by the State in which such notary resides and the association is located, or any other officer having an official seal, authorized in such State to administer oaths, and attested by the signature of at least three of

the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified, and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him; and the statement of resources and liabilities, together with acknowledgment and attestation in the same form in which it is made to the comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the comptroller. The comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to obtain a full and complete knowledge of its condition."

Section 5219 of the Revised Statutes, as amended by the Act of March 4, 1923, c. 267, 42 Stat. 1499, and March 25, 1926, c. 88, 44 Stat. 223 (12 U. S. C. A. 548):

"*Section 548. State taxation.* The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on

their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks; Provided, that bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits; *Provided, however,* That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes

a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by non-residents of any State, shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such non-resident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section."

Section 5239 of the Revised Statutes (12 U. S. C. A. 93):

> "*Section 93. Violation of provisions of chapter; forfeiture of franchise; personal liability of directors.* If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district, or Territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

Section 5240 of the Revised Statutes as amended by Act of February 19, 1875, c. 89, 18 Stat. 329, and Act of December 23, 1913, c. 6, Sec. 21, 38 Stat. 271 (12 U. S. C. A. 481):

> "*Section 481. Appointment of examiners; examination of member banks, State banks, and trust companies; reports.* The Comptroller of the Currency with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every member bank other than those expressly excepted by section 330 of this title, at least twice in each calendar year and oftener if considered necessary: *Pro-*

vided, however, That the Federal Reserve Board may authorize examination by the State authorities to be accepted in the case of State banks and trust companies and may at any time direct the holding of a special examination of State banks or trust companies that are stockholders in any Federal reserve bank. The examiner making the examination of any national bank, or of any other member bank, shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency."

EXHIBIT B.

THE FEDERAL RESERVE ACT.

Act of December 23, 1913, c. 6, Section 25, 38 Stat. 251, 273:

"*Sec. 25.* Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Federal Reserve Board, upon such conditions and under such regulations as may be prescribed by the said board, for the purpose of securing authority to establish branches in foreign countries or dependencies of the United States for the furtherance of the foreign commerce of the United States, and to act, if required to do so, as fiscal agents of the United States. Such application shall specify, in addition to the name and capital of the banking association filing it, the place or places where the banking

operations proposed are to be carried on, and the amount of capital set aside for the conduct of its foreign business. The Federal Reserve Board shall have power to approve or to reject such application if, in its judgment, the amount of capital proposed to be set aside for the conduct of foreign business is inadequate, or if for other reasons the granting of such application is deemed inexpedient. Every national banking association which shall receive authority to establish foreign branches shall be required at all times to furnish information concerning the condition of such branches to the Comptroller of the Currency upon demand, and the Federal Reserve Board may order special examinations of the said foreign branches at such time or times as it may deem best. Every such national banking association shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accruing at each branch as a separate item."

Act of December 23, 1913, c. 6, Sec. 25, 38 Stat. 273, as amended by Act of September 7, 1916, c. 461, Sec. 25, 39 Stat. 752, 755:

"*Sec. 25.* Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Federal Reserve Board for permission to exercise, upon such conditions and under such regulations as may be prescribed by the said board, either or both of the following powers:

"First. To establish branches in foreign countries or dependencies or insular posses-

sions of the United States for the furtherance of the foreign commerce of the United States, and to act if required to do so as fiscal agents of the United States.

"Second. To invest an amount not exceeding in the aggregate ten per centum of its paid-in capital stock and surplus in the stock of one or more banks or corporations chartered or incorporated under the laws of the United States or of any State thereof, and principally engaged in international or foreign banking, or banking in a dependency or insular possession of the United States either directly or through the agency, ownership, or control of local institutions in foreign countries, or in such dependencies or insular possessions.

"Such application shall specify the name and capital of the banking association filing it, the powers applied for, and the place or places where the banking operations proposed are to be carried on. The Federal Reserve Board shall have power to approve or to reject such application in whole or in part if for any reason the granting of such application is deemed inexpedient, and shall also have power from time to time to increase or decrease the number of places where such banking operations may be carried on.

"Every national banking association operating foreign branches shall be required to furnish information concerning the condition of such branches to the Comptroller of the Currency upon demand, and every member bank investing in the capital stock of banks or corporations described under sub-paragraph two of the first paragraph of this section shall be required to furnish information concerning the condition of such banks or corporations to the

Federal Reserve Board upon demand, and the Federal Reserve Board may order special examinations of the said branches, banks, or corporations at such time or times as it may deem best.

"Before any national bank shall be permitted to purchase stock in any such corporation the said corporation shall enter into an agreement or undertaking with the Federal Reserve Board to restrict its operations or conduct its business in such manner or under such limitations and restrictions as the said board may prescribe for the place or places wherein such business is to be conducted. If at any time the Federal Reserve Board shall ascertain that the regulations prescribed by it are not being complied with, said board is hereby authorized and empowered to institute an investigation of the matter and to send for persons and papers, subpoena witnesses, and administer oaths in order to satisfy itself as to the actual nature of the transactions referred to. Should such investigation result in establishing the failure of the corporation in question, or of the national bank or banks which may be stockholders therein, to comply with the regulations laid down by the said Federal Reserve Board, such national banks may be required to dispose of stock holdings in the said corporation upon reasonable notice.

"Every such national banking association shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item.

"Any director or other officer, agent, or employee of any member bank may, with the approval of the Federal Reserve Board, be a director or other officer, agent, or employee of any such bank or corporation above mentioned in the capital stock of which such member bank shall have invested as hereinbefore provided, without being subject to the provisions of section eight of the Act approved October fifteenth, nineteen hundred and fourteen, entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes'." Approved, September 7, 1916.

EXHIBIT C.

PHILIPPINE ADMINISTRATIVE CODE.

Sections 1499 and 1502 of the Philippine Administrative Code together with the enacting clause of the Code (Philippine Act, No. 2711, approved March 10, 1917):

"For the purpose of adapting it to the Jones Law and the Reorganization Act, Act Numbered Two thousand six hundred and fifty-seven, known as The Administrative Code, is hereby amended in certain particulars; and said Act shall hereafter read as follows:

Section 1. Title of Act.—This Act shall be known as the Administrative Code.

Section 1499. Tax on capital, deposits, and circulation of banks.—Subject to the exemption herein made there shall be collected from banks the following taxes on capital, deposits and circulations:

(a) Upon the capital employed by the bank,

for each month, one twenty-fourth of one per centum.

(b) Upon the average amount of deposits of money, subject to payment by check or draft, or represented by certificates of deposit, or otherwise, whether payable on demand, or on some future day, for each month, one-eighteenth of one per centum.

(c) Upon the average amount of circulation issued by the bank, including as circulation all notes and other obligations calculated or intended to circulate or be used as money, but not including such as may be retained in the vault of the bank or redeemed and on deposit for said bank, for each month, one-twelfth of one per centum.

(d) Upon the average amount of such circulation issued as above, being beyond the amount of the paid-in capital of the bank, for each month, and as an additional tax, one per centum.

'Bank' as herein used, includes every incorporated or other bank, and every person, association, or company having a place of business where credits are opened by the deposit or collection of money or currency subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale.

'Capital employed' does not include money borrowed or received from time to time in the usual course of business from any person not a partner of or interested in such bank; and no tax shall be imposed on the capital em-

ployed by any person whose sole business is lending money on real-estate security.

Section 1502. Computing resources of bank incorporated abroad.—The amount of capital used by a bank within the Philippine Islands, when such bank is a branch of a bank incorporated under laws of the United States or a foreign country, shall, for the purposes of assessment hereunder, be determined in the following manner: The total amount of the capital of the bank shall be ascertained, and, likewise, the total amount of the net earnings of the bank accruing during the preceding six months, and also the total amount of the net earnings accruing from the bank's business conducted in the Philippine Islands; and such a proportion of the total capital of the bank shall be deemed to have been employed in the Philippine Islands as the net earnings in the Philippine Islands bear to the total net earnings of the bank."

EXHIBIT D.

UNITED STATES OF AMERICA,

PHILIPPINE ISLANDS,

SUPREME COURT OF THE PHILIPPINE ISLANDS.

THE NATIONAL CITY BANK OF NEW YORK,
Plaintiff-Appellant,

—versus—

JUAN POSADAS, JR., Collector of Internal Revenue of the Philippine Islands,
Defendant-Appellant.

PREVAILING OPINION.

BUTTE, *J.*:

Under Section 1499 of the Administrative Code, the defendant Collector of Internal Revenue of the Philippine Islands assessed against the National City Bank of New York as capital and deposit taxes for the first half of the year 1931 the sum of P77,324.11. On October 23, 1931, the bank paid said taxes under protest. The grounds of the protest were stated as follows:

> "1. That the National City Bank of New York is a national banking association duly organized under the United States National Banking Act and is an agency of the United States created under its laws to promote the fiscal policies of the United States.

"2. That the National City Bank of New York has been duly authorized by the Federal Reserve Board to establish a branch in the Philippine Islands, and is now operating the same under the provisions of the United States Federal Reserve Act.

"3. That no state, territory or possession of the United States or any subdivision thereof has the power to tax national banks except as Congress expressly permits; that no such power has been granted to the Philippine Government.

"4. That under the provisions of the National Banking Act (sec. 548, Title 12, U. S. Code) each state may tax national banking associations in any one of four forms but the imposition of any one of such forms shall be in lieu of the others except that in the case of a tax upon net income, individuals may be taxed upon dividends from national banking associations if the law of the state provides for such a tax upon all business corporations and dividends therefrom.

"5. That the Philippine Islands imposes a tax upon net income and is therefore without power to impose any capital deposit, or other tax of any kind upon such national banking association."

On June 7, 1932, the bank filed its suit to recover the said taxes and alleges substantially the same grounds as those set out in the protest when the payment was made. Upon the hearing of the cause it was established by the evidence that the National City Bank of New York, duly organized under the Act of Congress of June 3, 1864, is located at No. 55 Wall Street in the City of New York with a present capital of $110,000,000. On January 23, 1930, the

Federal Reserve Board authorized said bank to establish branches in Manila and Cebu, Philippine Islands. These branches were in operation during the first half of the year 1931, the period covered by the taxes here in question.

On April 30, 1932, the plaintiff bank filed with the Bureau of Internal Revenue of the Philippine Islands a return of its net income from its branches in Manila and Cebu for the year 1931, a total of P518,871.61, upon which on June 3, 1932, it paid an income tax of P15,566.15 in accordance with the Internal Revenue laws of the Philippine Islands. This tax was paid without protest.

The trial court sustained the capital tax and ordered the deposit tax refunded to the plaintiff bank. Both parties have appealed to this court.

The Collector of Internal Revenue submits the following assignments of error:

> "1. The trial court erred in holding that the branch of the National City Bank of New York in Manila, Philippine Islands, is an instrumentality of the United States Government.
>
> "2. The trial court erred in holding that the branch of the National City Bank of New York in Manila, Philippine Islands, is only subject to the payment of taxes on its capital and not to the payment of taxes on its deposits also as provided for in section 1499 of Act No. 2711 (The Administrative Code), as amended.
>
> "3. The trial court erred in ordering the defendant to return to the plaintiff the amount of P61,219.43, which represents the tax on its deposits for the first half of the year 1931, paid

under protest by the said plaintiff to the defendant.

"4. The trial court erred in denying defendant's motion for a new trial."

At the outset it should be noted that the branches of the National City Bank of New York in Manila and Cebu are not separate legal entities. The Act of Congress of December 23, 1913 (U. S. C. Title 12, Sec. 601) provides in part:

> "Sec. 601. *Authorization; conditions and regulations.*—Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Federal Reserve Board for permission to exercise, upon such conditions and under such regulations as may be prescribed by the said board, either or both of the following powers:
>
> "First. To establish branches in foreign countries or dependencies or insular possessions of the United States for the furtherance of the foreign commerce of the United States, and to act if required to do so as fiscal agents of the United States."

It is shown by the evidence in this case that the local branches of the National City Bank of New York have no separate corporate franchise, no separate capital stock, and are operated directly by the bank through officers and managers appointed and controlled by the National City Bank of New York. The Act of Congress, *supra,* authorizing the establishment of branches clearly does not contemplate separate legal entities for it makes no provision for their form of organization or the amount of capital to be invested therein, as is done with reference to

investments by a national bank in other banks or corporations engaged in banking in a dependency or insular possession of the United States as set out in the second paragraph of U. S. C. Title 12, Section 601, *supra*. In a word, a "branch" is simply an extension of the business of a national bank to foreign countries, dependencies or insular possessions of the United States. The branch of the National City Bank of New York in Manila is the National City Bank of New York doing business in Manila.

On March 19, 1930, this bank filed with the mercantile register of the Bureau of Commerce of the Philippine Islands copies of its articles of incorporation, its by-laws, the power of attorney granted to its local manager and the order of the Federal Reserve Board granting permission to the National City Bank of New York to establish branches in Manila and Cebu. The very taxes here in question are assessed by the Government of the Philippine Islands against the "National City Bank of New York" and the receipts therefor were issued to the "National City Bank of New York" and quite properly so, for the branch as such has neither assets nor liabilities. It is true that the bank filed with the Collector of Internal Revenue a statement (Exhibit J) in which it undertook by an arbitrary calculation to furnish the Collector an estimated local capital of its Manila branch as a basis for the assessment of the capital tax. This was computed upon the following proportion: the capital, surplus and undivided profits of the bank ($224,554,298.54) is to its local capital as the total profits of the bank ($10,690,303.41) is to the profits of the Philippine branch ($151,851.11). This computation for the first half of the year 1931 resulted in a hypothetical local capital of P12,883,744.56. But this computation, submitted as it was under com-

pulsion and solely for the purpose of estimating the tax which was paid under protest, does not in our judgment constitute any sort of an admission on the part of the bank, and cannot be invoked here to create a corporate entity which does not exist in fact.

In the light of the foregoing the Collector's first assignment of error must be held to relate to the National City Bank of New York. That a national bank is an instrumentality of the government of the United States is a proposition supported both by actual facts and by so many decisions since the passage of the first national banking act, approved June 3, 1864, that it requires no citation of authorities and cannot be questioned now. It makes no difference in principle whether the bank functions as such instrumentality in its home office or in a branch office. The very act authorizing the establishment of branches provides that such branches may be established "for the furtherance of the foreign commerce of the United States and to act if required to do so as fiscal agents of the United States". Since the appeal in the present case was lodged in this court, the branch in Manila of the National City Bank of New York has performed an important fiscal service to the United States Government as a depository of gold under the Gold Reserve Act of January 30, 1934. There is, therefore, no merit in the Collector's first assignment of error.

We shall consider together the Collector's second assignment of error which relates to the payment of the tax on deposits and the bank's assignment of error which relates to the capital tax.

Section 1499 of the Administrative Code provides:

> "*Tax on capital, deposits, and circulation of banks.*—Subject to the exemption herein

made there shall be collected from banks the following taxes on capital, deposits, and circulation:

"(a) Upon the capital employed by the bank, for each month, one twenty-fourth of one per centum.

"(b) Upon the average amount of deposits of money, subject to payment by check or draft, or represented by certificates of deposits, or otherwise, whether payable on demand, or on some future day, for each month, one-eighteenth of one per centum.

"(c) Upon the average amount of circulation issued by the bank, including as circulation all notes and other obligations calculated or intended to circulate or be used as money but not including such as may be retained in the vault of the bank or redeemed and on deposits for said bank, for each month, one-twelfth of one per centum.

"(d) 'Bank' as herein used, includes every incorporated or other bank, and every person, association, or company having a place of business where credits are opened by the deposit or collection of money or currency subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale.

"'Capital employed' does not include money borrowed or received from time to time in the usual course of business from any person not a partner of or interested in such bank; and no tax shall be imposed on the capital employed by any person whose sole business is lending money on real-estate security."

Many attempts have been made by the several states and territories of the United States to levy taxes in one form or another upon national banks without the consent of Congress but they have uniformly failed. Chief Justice White, in the case of *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, 667, 43 Law Ed. 850, 852, which involved a franchise tax, stated the general principle thus:

> "Early in the history of this government, in cases affecting the Bank of the United States, it was held that an agency, such as that bank was adjudged to be, created for carrying into effect national powers granted by the Constitution, was not in its capital, franchises, and operations subject to the taxing powers of a state. *M'Culloch* v. *Maryland,* 4 Wheat. 316 (4:579); *Osborn* v. *Bank of the United States,* 9 Wheat. 738 (6:204).
>
> "The principles settled by the cases just referred to and subsequent decisions were thus stated by this court in *Davis* v. *Elmira Savings Bank,* 161 U. S. 283 (40:701):
>
> "'National banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a state, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal Government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanc-

tioned by the repeated adjudications of this Court.'

"It follows then necessarily from these conclusions that the respective states would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets, or franchises, were it not for the permissive legislation of Congress.

"The first act providing for the organization of national banks, passed February 25, 1863, chap. 58 (12 Stat. at L. 665), contained no grant of power to the states to tax national banks in any form whatever. Doubtless the far-reaching consequence to arise from depriving the states of the source of revenue which would spring from the taxation of such banks, and the error of not conferring the power to tax, early impressed itself upon Congress; for the following year (13 Stat. at L. 99, chap. 106) power was granted to the states, not to tax the banks, their franchises or property, but to tax the shares of stock in the names of the shareholders. This provision subsequently was amended and supplemented in various particulars (15 Stat. at L. 34, chap. 7), and the result of this legislation is embodied in section 5219 of the Revised Statutes."

In the case of the *First National Bank* v. *City of Hartford,* 273 U. S. 548, 71 L. Ed. 767, the court held void a discriminatory tax on shares of the capital of the bank on the ground that any attempt to discriminate against the capital invested in national bank shares is intended to be forbidden by R. S. 5219, and the court again called attention to the principle involved:

"National banks are not merely private moneyed institutions, but agencies of the United

States created under its law to promote its fiscal policies; and hence the banks, their property and their shares cannot be taxed under state authority except as Congress consents and then only in conformity with the restrictions attached to its consent. *First Nat. Bank* v. *Anderson, supra,* 347 (70 L. Ed. 302, 46 Sup. Ct. Rep. 135); *Des Moines Nat. Bank* v. *Fairweather,* 263 U. S. 103, 106, 88 L. Ed. 191, 195, 44 Supt. Ct. Rep. 23."

See also *First National Bank of Guthrie Center (Iowa)* v. *Anderson, Auditor,* 269 U. S. 341, 70 L. Ed. 295.

However, it is contended by the Solicitor-General on behalf of the Collector that the principle of exemption from taxation of the instrumentalities of the Federal Government applies only to the States of the American Union and arises from the peculiar relation between the Federal Government and the State government, each being sovereign within its respective sphere. If a State government should have the power to tax national banks without the consent of Congress, it would be possessed of the power to cripple these national instrumentalities, if not entirely to destroy them. But it is argued that no such relation exists between the Federal Government and a dependency like the Philippine Islands, which is under the direct and plenary control of Congress. Attention is called to section 19 of the Act of Congress of August 29, 1916, 39 Stat. 551, which provides that "all laws enacted by the Philippine Legislature shall be reported to the Congress of the United States which reserves the power and authority to annul the same".

Whatever may be said *ex hypothesi,* in support of the proposition that no such necessity for exemption

from taxation of the Federal instrumentalities exists in the Philippines as in the several States, the contrary is definitely settled by the decisions of this court. We said in the case of the *Standard Oil Company of New York* v. *Juan Posadas, Jr.*, 55 Phil. 715, 717-718:

> "It would further appear perfectly clear that the principle which prohibits a State from taxing the instrumentalities of the Federal Government applies with equal force to the Philippine Islands. At least, that was our holding in the *Post Exchange* case. Nevertheless the Attorney-General persists in assuming a difference in tax powers between the relations of the Philippine Government to the National Government and of a State government to the National Government. We are frank to say that we are unable to see eye to eye with the Attorney-General. It would be absurd to think that a derivative sovereignty like the Government of the Philippine Islands, could tax the instrumentalities of the very government which brought it into existence. If a sovereign State of the American Union cannot abridge or restrict the activities of the United States Government, much less can a creature of that Government, as the Philippine Government is, do so."

In the recent case of *Genato Commercial Corporation* v. *Insular Collector of Customs,* promulgated March 13, 1934, Vol. XXXII Off. Gaz. No. 69, page 1327, this Court said:

> "Without Congressional consent, no Federal agency or instrumentality can be taxed by the Government of the Philippine Islands."

See also *National City Bank of New York* v. *Domenech, Treasurer of Porto Rico,* 71 Fed. (2nd) 13.

This brings us to the question whether or not the Congress of the United States has given its consent that the National City Bank of New York should be subjected to the capital tax and the deposit tax here involved. The only statute in which Congress has consented that national banks may be subjected to local taxation is R. S. 5219 as amended by the Acts of March 4, 1923, 42 Stat. 1499 (U. S. C. Title 12, section 548), and the Act of March 25, 1926, 44 Stat. Chap. 88, 223. This is in part as follows:

> "Sec. 5219. The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said share, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:
>
> "1. (a) the imposition by any State of any of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause."

The Solicitor-General on behalf of the Collector contends that R. S. 5219 has never been extended to the Philippine Islands and is limited in its application to States of the American Union. The logical conclusion of his argument is that there are no express limitations or restrictions whatever upon the

Government of the Philippine Islands as regards the kind or amount of taxes it may levy upon national banks. It is not so stated but we assume the Solicitor-General would admit the implied limitation that no tax would be valid which would impair the usefulness of such banks as instrumentalities of the Federal Government.

The National City Bank of New York, as appellant, contends that R. S. 5219 was in force in the Philippine Islands before the enactment of the Act of August 29, 1916 (the Jones Law), 39 Stat. 547, and that it was continued in force under Section 6 of said Act which provides:

> "Sec. 6. That the laws now in force in the Philippines shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the legislative authority herein provided or by Act of Congress of the United States."

It is further intimated that the very Act of Congress authorizing the establishment of branches of national banking associations in the dependencies or insular possessions of the United States makes R. S. 5219 applicable to the Philippine Islands.

It is enough to say that except as provided in R. S. 5219, *supra,* Congress has not given its consent to the taxation of national banking associations as such. The language of that statute, as amended by the Act of March 25, 1926, is plain as to the four forms of taxation authorized. The omission of any reference to capital and deposit taxes in R. S. 5219 means simply that Congress has withheld its consent to these forms of taxation of national banks.

In the recent case of *National City Bank of New York* v. *Domenech, Treasurer of Puerto Rico,* 71 Fed. (2nd) 13, decided on May 18, 1934, the Circuit Court of Appeals of the First Circuit held void a capital tax similar to the one here in question levied by the government of Puerto Rico.

In so far as the judgment of the court below orders the refund of the deposit taxes paid under protest by the National City Bank of New York for the first six months of the year 1931, the same is affirmed; and in so far as it sustains the capital tax levied for the same period as aforesaid, it is reversed and the defendant Collector of Internal Revenue is ordered to refund to the said bank the entire amount of P77,-324.11 paid under protest as capital and deposit taxes, without interest (Section 1579, Administrative Code) or costs.

GEORGE BUTTE.

We concur:

(Sgd.) THOS. A. STREET.
(Sgd.) GEO. A. MALCOLM.
(Sgd.) ANTONIO VILLA-REAL.
(Sgd.) J. A. HULL.
(Sgd.) J. C. VICKERS.
(Sgd.) C. A. IMPERIAL.
(Sgd.) LEONARD S. GODDARD.
(Sgd.) ANACLETO DIAZ.

The Chief Justice took no part.
Justice Santos dissents in separate opinion.